NO. 20,400

United States Court of Appeals
for the Ninth Circuit

JULIA L. BOSTON, TRUSTEE IN BANKRUPTCY,

Appellant,

v.

LUELLA V. GARDNER, BANKRUPT,

Appellee.

Appeal from the United States District Court For The District of Oregon

THE HONORABLE WILLIAM G. EAST, *Judge*

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

Statement of Case 1

Summary of Argument 4

Child support payments past due at filing of petition in bankruptcy are in the nature of reimbursement to person having supplied support to child during delinquency of father in making support payments.

Argument 6, 8, 11, 12

1. Support having been supplied to child by the bankrupt during the father's default in support payments, the father became liable to the bankrupt for reimbursement to the extent of support furnished. Thus, the claim is an asset of bankrupt's estate and passed to the Trustee. 6

II. Child support is included within the definition of "Alimony". As alimony, past due installments pass to the Trustee as a "right of action" under Section 70A(5) of the Bankruptcy Act. 8

III. Person supplying support to child during delinquency in payments by father is entitled to reimbursement from father. 11

IV. Payments past due at filing of petition in bankruptcy are the property of the bankrupt because past due payments are in the nature of reimbursement for support already advanced by custodial parent. 12

TABLE OF AUTHORITIES CITED

Cases

Page

Pavuk v. Sheets, 108 Ind. App. 492 .... 6, 12, 13

McCormick v. Collard (1938) 105 Ind. App. 92, 10 N.E. (2d) 742 .... 7, 12, 13

State ex rel Casey v. Casey, 175 Or. 328, 153 P. 2d 700 8

Statutes

Section 70 Bankruptcy Act (11 U.S.C. Sec. 110) 8, 9

Texts

17 Am. Jur., Divorce and Separation, § 871 11

50 Am. Jur., Statutes, § 434 10

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

About six months before bankruptcy Frederic W. Young, an attorney representing creditors of Mrs. Gardner, subsequently the bankrupt herein, having discovered that the only assets of Mrs. Gardner available to creditors were judgments in divorce decrees of past due child support against two of her former husbands (Severson and Tagliamani) entered into an

agreement with Mrs. Gardner to effect collection of the past due child support upon the judgments, the collection to be applied 50% to Frederic W. Young as his fee for the collection, the moneys then to be applied to the indebtedness owed by Mrs. Gardner to the creditors whom Mr. Young represented and the balance to be remitted to Mrs. Gardner.

The sums accured and owing on these decrees were scheduled by Mrs. Gardner as amounts owing to her at the time of the filing of her petition in bankruptcy on May 6, 1964. (Hereinafter Mrs. Gardner will be referred to as "bankrupt".) As liabilities she listed debts accumulated over many years totaling about $11,600. These debts included many bills owing to doctors, hospitals, groceries, dairies, utilities, landlords and dealers in merchandise of various kinds.

In April, 1964 Mr. Young caused an execution to be issued on the judgment of the Severson divorce decree with a writ of garnishment to be served upon Severson, a resident of the state of Washington, by serving Friden, Inc. in Portland. At the time of the filing of the petition in bankruptcy the child was eighteen and one-half years old. From this writ Mr. Young recovered $149.33, which sum was in his possession at the time of bankruptcy. Upon order of Referee Estes Snedecor, Referee in Bankruptcy, United States District Court for the District of Oregon, Mr. Young, after deducting $4.75 as execution costs,

turned over to the Trustee one-half of the net amount realized. At about the time of bankruptcy Mr. Young obtained an offer from former husband Severson of $800 in full satisfaction of the judgment for delinquent installments. In view of the legal difficulties involved in collection of judgments against one spouse only in a community property state, the Trustee recommended the acceptance of the offer subject to the payment of Mr. Young's contingent fee. The question before the court is whether the Trustee is entitled to the proceeds of the offer and is vested with authority to enter a satisfaction of the judgment.

Referee Estes Snedecor, after a hearing in which the Referee personally questioned the bankrupt, entered herein Referee's Opinion, Findings and Order on the 10th day of December, 1964, in which he decreed that the right to collect the judgment for installments of child support accrued and owing at the time of filing of the petition in bankruptcy passed to the Trustee; subsequently, the bankrupt petitioned the United States District Court for the District of Oregon for a review of the Referee's opinion and the Honorable William G. East, in an opinion dated June 30, 1965 reversed the opinion of Referee Snedecor. Appeal from the decision of Judge East is the matter before this court.

SUMMARY OF ARGUMENT

During the period in which the child's father was delinquent in his child support payments to the bankrupt, the bankrupts creditors, in effect, supplied support for the child. While Courts are reticent to say what portion of common income belongs to the particular member of a family, they are agreed that the benefits and detriments of families are shared by all members of a family.

The schedules of the bankrupt indicate debts to medical doctors, veterinarians, loan companies, several rairies, department stores, several landlords for rent, utility companies, fuel companies, refuse services, transportation expenses, etc.

Clearly, it cannot be denied that these items were shared by the Severson child and each month the father was in default upon his support obligation these creditors and others were deprived of a payment which should have, and no doubt would have, been made to them had the support payments been made by the father to the bankrupt.

It is inconceivable that these creditors may be asked to discharge debts incurred because of the failure to effect collection from the father of this child without sharing in the reimbursement for which the bankrupt contends and which reimbursement is available

to her, and which had formerly been assigned by her for benefit of her creditors.

The present contention of the bankrupt that the past due support payments are not her property is in direct contravention to her position at the time of the making of her contract with and assignment to Frederic W. Young.

Trustee's contention is that the contract is a contract involving property of the bankrupt by way of reimbursement due to the bankrupt from the father for support advanced by the bankrupt for the support of the child during periods of default by the father.

The Bankruptcy Court, as a court of equity, weighed the equities between the bankrupt and the unsecured creditors represented by the Trustee and found the equitable solution to be that the unsecured creditors were entitled to share in the proceeds collectible from child support past due at the filing of the petition in bankruptcy.

Clearly, if a person or agency other than the mother had supplied the support for this child — for instance, an agency such as State Welfare or a grandparent—there is no question but that such agency or other party would be entitled to reimbursement from the father for the support supplied to the child —and there is no question that this indebtedness by

the father to the grandparent would constitute an asset of the grandparent's estate, as a decedent or a bankrupt, and that the cause of action for the reimbursement of funds so spent would survive the grandparent. Certainly, the principle is not *changed* by the fact that the mother of the child supplied support for him during the father's delinquency.

ARGUMENT

I. THE COURT ERRED AS A MATTER OF LAW IN EXCLUDING CHILD SUPPORT PAYMENTS PAST DUE AT DATE OF FILING OF PETITION IN BANKRUPTCY FROM ESTATE OF BANKRUPT.

Support having been supplied to child by the bankrupt during the father's default in support payments, the father became liable to the bankrupt for reimbursement to the extent of support furnished. Thus, the claim is an asset of bankrupt's estate and passed to the Trustee.

Bankrupt's attorney, in his Memorandum of Authority, cites the case of *Pavuk v. Scheetz,* 108 Ind. App. 494, for the proposition that:

> "Decrees of this class do not create the relationship of debtor and creditor between the father and the party to whom the custody of the children is given." p. 501

This sentence must be read in context with the whole opinion and especial attention given to the words of

the sentence. This case says that *Decrees* do not create the relationship of debtor and creditor between the father and the person to whom the custody of the children is given. However, on the preceding page (500 of the opinion) the Court states:

> "This court has held that when the father fails to comply with the court's decree as to payment for support, and continous support is furnished *by the person awarded the custody* so as to meet the exigencies arising, sound public policy requires that the father be held liable to the one having the legal custody of said child, or children, where such person has expended for that purpose an amount equal to, or in excess of that which the father was obligated to pay, but did not pay for the support of the child." *McCormick v. Collard* (1938), 105 Ind. App. 92, 10 N.E. (2d) 742.

Thus it would appear that the rendering of the Decree does not create the relationship of debtor and creditor between the father and the party to whom the custody of the children is given, but that as to past due installments which are in the nature of reimbursements to the person awarded the custody or to the person supplying the support for the child in an amount equal to or in excess of that which the father was obligated to pay, the status of debtor and creditor obtains between the father and the party who has supplied support for the child.

The decision in the *Pavuk* case, supra, turned on the fact that the mother was seeking reimbursement but

had not met the burden of pleading and proving what amounts she had been required to pay and did pay for the maintenance of the child during the time the father was delinquent in the support payments. This case then holds that payments made in accordance with the Decree (which can only mean current and future payments) are to be used for the benefit of the children, but that past due payments are in the nature of reimbursement to the person who has supplied the maintenance of the children.

II. THE COURT ERRED AS A MATTER OF LAW IN RULING THAT CHILD SUPPORT PAYMENTS PAST DUE AT DATE OF FILING OF PETITION IN BANKRUPTCY DID NOT PASS TO TRUSTEE UNDER SECTION 70a(5) OF THE BANKRUPTCY ACT.

Child support is included within the definition of "alimony". As alimony, past due installments pass to the Trustee as a "right of action" under Section 70a (5) *of the Bankruptcy Act.*

In addition to the inclusion of child support within the meaning of alimony in most, if not all, of the cases cited by bankrupt's memorandum, the Oregon court has by a number of decisions definitely stated that child support is included within the definition of the word alimony.

The Oregon case of *State ex rel Casey v. Casey,* 175 Or. 328, 153 P. 2d 700, states:

> "In a strict legal sense, 'alimony' means an allowance which the husband is required to pay to the wife for her maintenance pending or following her divorce or legal separation from him. In a broader sense, however, it covers an award made for the support of minor children. (citing authorities). The legislatures of some of the states have used the word 'alimony' in the sense of support for minor children. (citing authorities)." p. 335.

Alimony due and owing to a bankrupt at the time of filing of the petition in bankruptcy, although not specifically mentioned in the Bankruptcy Act, has always passed to the Trustee in Bankruptcy.

Section 70 of the Bankruptcy Act (11 U.S.C. Section 110) provides that the trustee of the estate of a bankrupt is vested by operation of law with the title of the bankrupt to "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered: Provided, that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the state such rights of action are subject to attachment, execution, garnishment, sequestration or other judicial process."

The exceptions above mentioned do not include rights of action for accrued support of minor children.

> "The specification by the legislature of exceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. In this respect, it has been declared that the courts will not enter the legislative field and add to exceptions prescribed by statute." 50 Am.Jur., Statutes, § 434.

Futhermore, subsection c of Section 70 of the Bankruptcy Act provides that:

> "The trustee, as to all property, whether or not coming into possession of control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

III. THE COURT ERRED AS A MATTER OF LAW IN RULING THAT CUSTODIAL PARENT LACKS OWNERSHIP OF CHILD SUPPORT PAYMENTS PAST DUE AT FILING OF PETITION IN BANKRUPTCY.

The fact that the bankrupt herein chose to levy upon the judgment rather than to bring a contempt proceeding or to sue on the debt to her was a matter of convenience and did not change the character of the debt due from the father to her.

It was bankrupt's testimony at the hearing before Referee Snedecor that she had supplied the Severson child with all the necessaries and any spending money which he required and that this child had wanted for nothing and that, if the father had complied with the terms of the Decree, the money received by her would undoubtedly have been applied to the reduction of indebtedness to creditors listed in her schedules in bankruptcy.

> "Where the father is liable for support furnished by the mother after divorce, the liability is usually enforced in an action at law for necessaries furnished a minor. It has been held that a mother who has furnished such support has her choice of a common law action or a petition to open the the judgment of divorce." 17 Am. Jur., Divorce and Separation, 871 p. 61.

The fact that the bankrupt herein chose to levy upon the judgement rather than to bring a contempt

proceeding or to sue on the debt to her was a matter of convenience and did not change the character of the debt due from the father to her.

In the case of *Pavuk v. Scheetz,* supra, it is stated:

> "If, when need requires, the one granted the legal custody of the child meets any exigency out of his own funds, such action being necessary because of a failure on the part of the father to discharge the duty imposed upon him by the court, then such person, to the extent he has supplied the necessary funds, may recover of the father the amount used for the purpose, provided such amount does not exceed the amount of support money due and unpaid. *McCormick v. Collard.*"

IV. THE COURT ERRED AS A MATTER OF LAW IN RULING THAT THE CHILD SUPPORT PAYMENTS PAST DUE AT THE FILING OF THE PETITION IN BANKRUPTCY COULD NOT SURVIVE THE BANKRUPT, BE TRANSFERRED BY HER, NOR BE LEVIED UPON, SEIZED, IMPOUNDED OR SEQUESTERED IN A PROCEEDING AGAINST HER IN HER PERSONAL CAPACITY.

Clearly, these child support payments past due at the time of the filing of the bankrupt's petition in bankruptcy could be AND IN FACT WERE transferred by her to those of her creditors who were represented by Frederic W. Young.

Equally clear is the fact that this money now owing to the bankrupt in the nature of a reimbursement of moneys already expended by her for the support of the child, while the father was in default in his payments, would survive her, could be levied upon, seized, impounded or sequestered in a proceeding against her in her personal capacity.

> "If, when needs requires, the one granted the legal custody of the child meets any exigency out of his own funds, such action being necessary because of a failure on the part of the father to discharge the duty imposed upon him by the court, then such person, to the extent he has supplied the necessary funds, may recover of the father the amount used for the purpose, provided such amount does not exceed the amount of support money due and unpaid. *McCormick v. Collard.*" *Pavuk v. Scheetz,* supra.

But for the interruption of this assignment by bankruptcy, this assignment would have been carried out by Frederic W. Young and honored by the bankrupt—which would have resulted in payment in full of at least those creditors represented by Frederic W. Young and in whose favor the assignment was drawn.

CONCLUSION

The merits of the Trustee's position are clear and only one result can equitably emerge: the unsecured creditors of the bankrupt should not be precluded from sharing in reimbursement recoverable by bankrupt for support advanced to child during delinquency in support payments ordered to be made by father of child when supplying of support to child by mother deprived creditors of payments in amounts which father was delinquent and for which payments bankrupt failed to effect collection.

Injustice has been done to creditors of bankrupt by precluding them from sharing in reimbursement available to bankrupt. The decision of Judge East should be reversed and the Opinion of Referee Snedecor affirmed.

Respectfully submitted,

JULIA L. BOSTON
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIA L. BOSTON
Attorney for Appellant.